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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1192

CAMILLE R. GUMP, Executrix, EDWIN
LETTIS OLIVER, Executor of the
Estate of Alfred S. Gump, Deceased,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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No.

CAMILLE R. GUMP, Executrix, EDWIN
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Estate of Alfred S. Gump, Deceased,
Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.**

*To the Honorable Harlan Fiske Stone, Chief Justice
of the United States, and to the Associate Justices
of the Supreme Court of the United States:*

Your petitioners, Camille R. Gump, executrix, and
Edwin Letts Oliver, executor of the estate of Alfred S.
Gump, deceased, respectfully show:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioners are, respectively, the executrix and executor of the estate of Alfred S. Gump, deceased, who was born in the United States on January 30, 1866, and died on January 23, 1934, being at the time of his death a resident of the City and County of San Francisco, State of California. In due course decedent's last will and testament was admitted to probate, and Camille R. Gump was appointed executrix, and Edwin Letts Oliver executor thereof. Appropriately, a Federal estate tax return was filed, in which one-half of the estate was returned, it being the contention that the remainder of the estate was community property which belonged to Camille R. Gump.

Decedent married Camille R. Gump on March 28, 1905. At that time he was a stockholder and an employee of S. & G. Gump Company, a corporation. The stock so held by decedent had a book value of \$41,636.00. (R. 91-92.) S. & G. Gump Company were art dealers, and suffered a loss as a result of the earthquake and fire of April 18, 1906. Operation of the business ceased for several months, but was resumed about November 3, 1906. At that time the surplus of the Company had entirely disappeared, and the book value and the par value of the stock was \$200,000.00, making the value of the shares held by Alfred S. Gump, \$25,000.00. (R. 92.) The business of S. & G. Gump Company was owned entirely at that time by Abraham L. Gump, William E. Gump and the decedent, all of whom were brothers. From March

28, 1905, to February 9, 1929, decedent and his brothers devoted their entire time and efforts to the development and building up of the business of S. & G. Gump Company, and the success of that company was largely due not to the invested capital, but to the ability, hard work and efforts of the decedent and his two brothers. (R. 93-94.)

On or about March 2, 1911, decedent and his two brothers incorporated the S. & G. Gump Realty Company with an authorized capital of \$20,000.00, consisting of 40 shares of common stock of the par value of \$500.00 each, of which 15 shares were issued to decedent. (R. 89, 95-96.)

Between March 28, 1905, the date of decedent's marriage to Camille R. Gump, and February 9, 1929, there was issued in the name of decedent 2639 shares of the common stock of S. & G. Gump Company, and as of February 9, 1929, decedent held 2664 shares of the outstanding common stock of said company. (R. 94.)

During the period from July 29, 1927 (which was the effective date of the last amendment of the Community Property Law of the State of California) to December 31, 1928, the earned surplus of S. & G. Gump Company increased by \$557,510.08. This increase amounted to \$74.335 per share on the 7500 shares of the common stock of the corporation outstanding at each of these dates. This increase in the surplus constituted an increase of \$198,028.44 in the book value of the 2664 shares of the common stock of the corporation held by decedent, Alfred S. Gump.

This increase of the earned surplus was after making provision for cash dividends of \$45,000.00 on the common stock which was paid early in 1929, and after deduction for a reserve of \$68,972.57 for the 1928 income tax. (R. 90-91.)

On February 9, 1929, decedent and Camille R. Gump, his wife, by written contract, sold to Abraham L. Gump 2710 shares of the common stock of S. & G. Gump Company, and 15 shares of the capital stock of S. & G. Gump Realty Company for a total consideration of \$1,184,994.45, \$500,000.00 of this consideration was paid in cash on February 9, 1929, and the balance was payable in installments over a period of years. (R. 72.)

The contract provided that the consideration to be paid for the 2710 shares of the capital stock should be the book value of said stock as it appeared on the books of the corporation at the close of business December 31, 1928. On December 23, 1929, a second contract was made between decedent and Camille R. Gump and Abraham L. Gump, in which it was agreed that the price to be paid for the 2710 shares of the common stock of S. & G. Gump Company should be the sum of \$1,100,976.25, and the 15 shares of the capital stock of S. & G. Gump Realty Company should be the sum of \$84,018.20, making a total of \$1,184,994.45. (R. 78.)

At the time of the death of Alfred S. Gump, besides the \$500,000.00 down payment on February 9, 1929, there had been paid \$300,000.00 on the installment obligation, making a total payment of \$800,000.00, and

leaving an unpaid balance at the time of the death of decedent of \$384,994.45. (R. 69.)

During his lifetime decedent had reported his income for Federal tax purposes on the basis of a calendar year. He used the cash receipt and cash disbursement basis. After their qualification the executrix and executor of his estate filed a Federal income tax return for the calendar year of 1933, and also a Federal income tax return for the period from January 1 to January 23, 1934, the date of death. These returns used the same basis of cash receipts and disbursements, except as to items of accrual of income and deductions required to be included in the last mentioned return, in accordance with Sections 42 and 43 of the Revenue Act of 1934. (R. 70.)

The unrealized gains upon the installment contract were not reported in the last mentioned return as a bond was filed with the Commissioner in accordance with Sec. 44 (d) of the Revenue Act of 1934. (R. 85-87.)

Respondent determined that the sale of said shares under said contracts of February 9, 1928, and December 23, 1928, was on the installment basis. Respondent also determined that 74.0458% of each dollar collected on said \$384,994.45 subsequent to death was taxable income to the estate. The respondent has refused to treat the payments so made to the estate as payments of principal applicable to said principal obligation. (R. 93.)

The Federal estate tax return (R. 98-122) filed by the executrix and executor, showed a total net tax

of \$12,554.80, which was paid on January 27, 1935. Respondent examined and audited the return, and determined that the value of the gross estate subject to the Federal estate tax was \$802,737.41, and that the taxable net estate under the 1926 Act was \$535,889.29, and that the taxable net estate under the 1932 Act was \$585,889.29. (R. 70-71.)

In his determination of the value of the gross and net estate, the respondent did not exclude from the value of the gross estate any amount whatsoever as and for the community property interest of Camille R. Gump existing at the date of decedent's death. (R. 71.)

Included in the gross estate of \$802,737.41 found by the respondent is the sum of \$384,994.45, being the amount of the unpaid installment obligation under the contracts of February 9, 1929, and December 23, 1929.

The respondent determined that there was a deficiency of \$32,175.18. The petitioners appealed to the Board of Tax Appeals from the determination of the respondent, asserting that the amount of the deficiency in the sum of \$32,175.18 was improper, and alleged that a refund of the amount theretofore paid by the petitioners as an estate tax in the sum of \$12,554.86 was proper. The Board of Tax Appeals sustained the action of the Commissioner of Internal Revenue in the major part, holding that no refund in the amount theretofore paid as an estate tax should be granted, and that a deficiency existed in the estate tax in the sum of \$32,010.02. On October 9, 1940, the Board

entered its decision ordering and deciding that there was a deficiency in the estate tax in the amount of \$32,010.02. (R. 52.)

B.

QUESTIONS PRESENTED.

This petition for writ of certiorari presents the following questions:

1. Whether or not community property accumulated by a resident of California subsequent to the effective date of the amendment to Section 161a of the Civil Code of the State of California (July 29, 1927) is to be included in the gross estate of the decedent for Federal estate tax purposes, or whether one-half of such community property is to be included.

2. Whether or not community property accumulated by a decedent subsequent to the 1923 amendment to Section 1401 of the Civil Code of the State of California (now Section 201 of the Probate Code) is to be included in its entirety in the gross estate of the decedent for Federal estate tax purposes, or whether only one-half thereof shall be included.

3. Whether or not the full face value of unpaid installment obligations is to be included in the gross estate of a decedent for Federal estate tax purposes where such decedent during his lifetime reported for income tax purposes the gains thereof under the installment method provided for by Section 44 of the Internal Revenue Act, and where the estate, by reason of filing of bond under Section 44 (d), is

obligated to pay income tax, the same as decedent would have paid had he lived.

4. Whether petitioners are entitled under the authority of *Bull v. United States*, 294 U. S. 247, to an offset against the estate tax in the amount of income tax payable by the estate upon the gains realized upon collection of the installment obligations subsequent to death.

C.

BASIS UPON WHICH IT IS CONTENDED THE SUPREME COURT HAS JURISDICTION TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS.

1. The United States Circuit Court of Appeals for the Ninth Circuit failed to pass upon and determine the effect of the 1923 amendment to Section 201 of the Probate Code of the State of California with reference to the character of the wife's interest in community property accumulated from that date forward.

2. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in refusing to be bound by or follow the decisions of the Supreme Court of the State of California in the cases of *Pereira v. Pereira*, 156 Cal. 1, *Estate of Fellows*, 106 Cal. App. 681, *In re Gold Estate*, 170 Cal. 621, and the Supreme Court of the State of Washington, *In re Buchanan's Estate*, 154 Pac. 129, and Section 161a of the *Civil Code of California* with reference to the accretion to community property of capital accumulated wholly by the efforts of the husband during coverture is in

conflict with the applicable decisions of the United States Supreme Court.

3. The decision of the United States Circuit Court of Appeals for the Ninth Circuit holding that the Board of Tax Appeals did not commit error when it held that the Commissioner of Internal Revenue properly included in the gross estate of the decedent all unrealized gains on installment obligations, said gains also being subject to an income tax when collected, is contrary to the decision of the United States Supreme Court in the case of *Bull v. United States*, 295 U. S. 247, and in conflict with the case of *Nichols v. United States*, 64 Court of Claims 241, certiorari denied 277 U. S. 584, and the Court erred when it held that no credit against the Federal estate tax could be given for the \$25,877.59 income tax imposed upon the gains under the installment contract.

4. The decision of the United States Circuit Court of Appeals for the Ninth Circuit holding that the Board of Tax Appeals did not commit error when it held that under the Revenue Act of 1928 the entire gain on the sale of the shares of stock of S. & G. Gump Company on the installment basis was realized in 1929.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court for the Ninth Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all

proceedings in the case numbered and entitled on its docket "No. 9825, Camille R. Gump, Executrix, Edwin Letts Oliver, Executor of the Estate of Alfred S. Gump, Deceased, Petitioners, vs. Commissioner of Internal Revenue, Respondent", and that the said judgment of said Circuit Court may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Dated, San Francisco, California,
April 27, 1942.

CHELLIS M. CARPENTER,
CHARLES A. CHRISTIN,
WALTER CHRISTIE,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

I, the undersigned, CHELLIS M. CARPENTER, do hereby certify that I am one of the counsel for the petitioners above named; that in my opinion the petition is well founded in point of fact and law, and is not interposed for purposes of delay.

Dated, San Francisco, California,
April 27, 1942.

CHELLIS M. CARPENTER,
Counsel for Petitioners.